

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

PABLO HERNANDEZ,

Plaintiff,

v.

CALIFORNIA DEPARTMENT OF
CORRECTIONS, et al.,

Defendants.

No. 2:20-cv-0739 DB P

ORDER

Plaintiff is a state prisoner proceeding pro se with a civil rights action pursuant to 42 U.S.C. §1983. Plaintiff claims defendant failed to protect him in violation of his Eighth Amendment rights. Presently before the court is plaintiff's motion to proceed in forma pauperis (ECF No. 2), motion to appoint counsel (ECF No. 5), and his complaint for screening (ECF No. 1). For the reasons set forth below, the court will grant the motion to proceed in forma pauperis, deny the motion to appoint counsel, and dismiss the complaint with leave to amend.

IN FORMA PAUPERIS

Plaintiff has submitted a declaration that makes the showing required by 28 U.S.C. § 1915(a). (ECF No. 2.) Accordingly, the request to proceed in forma pauperis will be granted.

Plaintiff is required to pay the statutory filing fee of \$350.00 for this action. 28 U.S.C. §§ 1914(a), 1915(b)(1). By this order, plaintiff will be assessed an initial partial filing fee in accordance with the provisions of 28 U.S.C. § 1915(b)(1). By separate order, the court will direct

the appropriate agency to collect the initial partial filing fee from plaintiff's trust account and forward it to the Clerk of the court. Thereafter, plaintiff will be obligated for monthly payments of twenty percent of the preceding month's income credited to plaintiff's prison trust account. These payments will be forwarded by the appropriate agency to the Clerk of the Court each time the amount in plaintiff's account exceeds \$10.00, until the filing fee is paid in full. 28 U.S.C. § 1915(b)(2).

SCREENING

I. Legal Standards

The court is required to screen complaints brought by prisoners seeking relief against a governmental entity or an officer or employee of a governmental entity. See 28 U.S.C. § 1915A(a). The court must dismiss a complaint or portion thereof if the prisoner has raised claims that are legally "frivolous or malicious," that fail to state a claim upon which relief may be granted, or that seek monetary relief from a defendant who is immune from such relief. See 28 U.S.C. § 1915A(b)(1) & (2).

A claim is legally frivolous when it lacks an arguable basis either in law or in fact. Neitzke v. Williams, 490 U.S. 319, 325 (1989); Franklin v. Murphy, 745 F.2d 1221, 1227-28 (9th Cir. 1984). The court may, therefore, dismiss a claim as frivolous where it is based on an indisputably meritless legal theory or where the factual contentions are clearly baseless. Neitzke, 490 U.S. at 327. The critical inquiry is whether a constitutional claim, however inartfully pleaded, has an arguable legal and factual basis. See Franklin, 745 F.2d at 1227. Rule 8(a)(2) of the Federal Rules of Civil Procedure "requires only 'a short and plain statement of the claim showing that the pleader is entitled to relief,' in order to 'give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.'" Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007) (quoting Conley v. Gibson, 355 U.S. 41, 47 (1957)).

However, in order to survive dismissal for failure to state a claim a complaint must contain more than "a formulaic recitation of the elements of a cause of action;" it must contain factual allegations sufficient "to raise a right to relief above the speculative level." Bell Atlantic, 550 U.S. at 555. In reviewing a complaint under this standard, the court must accept as true the

1 allegations of the complaint in question, Hospital Bldg. Co. v. Rex Hospital Trustees, 425 U.S.
2 738, 740 (1976), construe the pleading in the light most favorable to the plaintiff, and resolve all
3 doubts in the plaintiff's favor. Jenkins v. McKeithen, 395 U.S. 411, 421 (1969).

4 The Civil Rights Act under which this action was filed provides as follows:

5 Every person who, under color of [state law] . . . subjects, or causes
6 to be subjected, any citizen of the United States . . . to the deprivation
7 of any rights, privileges, or immunities secured by the Constitution .
8 . . shall be liable to the party injured in an action at law, suit in equity,
9 or other proper proceeding for redress.

10 42 U.S.C. § 1983. Here, the defendants must act under color of federal law. Bivens, 403 U.S. at
11 389. The statute requires that there be an actual connection or link between the
12 actions of the defendants and the deprivation alleged to have been suffered by plaintiff. See
13 Monell v. Dept. of Social Servs., 436 U.S. 658 (1978); Rizzo v. Goode, 423 U.S. 362
14 (1976). "A person 'subjects' another to the deprivation of a constitutional right, within the
15 meaning of § 1983, if he does an affirmative act, participates in another's affirmative acts or
16 omits to perform an act which he is legally required to do that causes the deprivation of which
17 complaint is made." Johnson v. Duffy, 588 F.2d 740, 743 (9th Cir. 1978).

18 Moreover, supervisory personnel are generally not liable under § 1983 for the actions of
19 their employees under a theory of respondeat superior and, therefore, when a named defendant
20 holds a supervisory position, the causal link between him and the claimed constitutional
21 violation must be specifically alleged. See Fayle v. Stapley, 607 F.2d 858, 862 (9th Cir. 1979);
22 Mosher v. Saalfeld, 589 F.2d 438, 441 (9th Cir. 1978). Vague and conclusory allegations
23 concerning the involvement of official personnel in civil rights violations are not sufficient. See
24 Ivey v. Board of Regents, 673 F.2d 266, 268 (9th Cir. 1982).

25 **II. Allegations in the Complaint**

26 Plaintiff claims the events giving rise to his claim occurred while he was incarcerated at
27 California State Prison, Sacramento (CSP-SAC). (ECF No. 1 at 4.) He names the following
28 defendants: (1) the California Department of Corrections and Rehabilitation (CDCR); (2) the
Warden of CSP-SAC; (3) correctional officer Burkhardt; (4) correctional officers Childs; and (5)
the Director of Corrections. (Id. at 2, 4.)

1 Plaintiff alleges that officer Burkhardt walked him to group and placed ankle restraints on
 2 him while he was in the hallway. (Id. at 4.) Plaintiff claims that because staff failed to search the
 3 inmates for weapons and did not supervise the group, another inmate was able to free himself
 4 from his restraints and stab plaintiff in the neck. Plaintiff further alleges that after he was stabbed
 5 he yelled help for “at least six to seven minutes” before officers responded. He claims “the
 6 person who was in charge for having those chairs in that room for groups should [have] known it
 7 was a problem after having that issue happen before” on a different prison yard. (Id. at 5.)

8 **III. Does Plaintiff State a Claim Under § 1983?**

9 **A. Failure to Protect**

10 The Eighth Amendment requires that prison officials take reasonable measures for the
 11 safety of prisoners. Farmer v. Brennan, 511 U.S. 825, 832 (1994). In particular, prison officials
 12 have a duty to protect prisoners from violence at the hands of other prisoners. Id. at 833; Hearns
 13 v. Terhune, 413 F.3d 1036, 1040 (9th Cir. 2005); Hoptowit v. Ray, 682 F.2d 1237, 1250 (9th Cir.
 14 1982). The failure of prison officials to protect inmates from attacks by other inmates may rise to
 15 the level of an Eighth Amendment violation where prison officials know of and disregard a
 16 substantial risk of serious harm to the plaintiff. E.g., Farmer, 511 U.S. at 847; Hearns, 413 F.3d
 17 at 1040.

18 A failure to protect claim under the Eighth Amendment requires a showing that “the
 19 official [knew] of and disregard[ed] an excessive risk to inmate . . . safety.” Farmer, 511 U.S. at
 20 837. “Whether a prison official had the requisite knowledge of a substantial risk is a question of
 21 fact subject to demonstration in the usual ways, including inference from circumstantial evidence,
 22 . . . and a factfinder may conclude that a prison official knew of a substantial risk from the very
 23 fact that a prison official knew of a substantial risk from the very fact that the risk was obvious.”
 24 Id. at 842 (citations omitted). The duty to protect a prisoner from serious harm requires that
 25 prison officials take reasonable measures to guarantee the safety and well-being of the prisoner.
 26 Id. at 832-33; Frost v. Agnos, 152 F.3d 1124, 1128-29 (9th Cir. 1998). Because “only the
 27 unnecessary and wanton infliction of pain implicates the Eighth Amendment,” plaintiff must

28 ///

1 allege facts showing the defendant acted with a “sufficiently culpable state of mind.” Wilson v.
 2 Seiter, 501 U.S. 294, 297 (1991) (internal quotation marks, emphasis, and citations omitted).

3 Plaintiff has alleged that he was stabbed by another inmate because officers failed to
 4 search inmates for weapons and did not supervise the group. (ECF No. 1 at 4-5.) Such
 5 allegations are sufficient to state a claim under the Eighth Amendment. However, the allegations
 6 in the complaint do not sufficiently specify which defendants are responsible for the alleged
 7 violations. While plaintiff has stated officer Burkhardt placed restraints on his ankles, it is not
 8 clear from the allegations in the complaint if Burkhardt was the officer responsible for restraining
 9 and searching the inmate who attacked plaintiff. Additionally, plaintiff has named officer Childs
 10 as a defendant, but there are no factual allegations related to Childs in the complaint. In any
 11 amended complaint, plaintiff should identify specific defendants and state with specificity what
 12 actions the identified defendants took, or failed to take, that led to his injury.

13 **B. Eleventh Amendment Immunity**

14 Plaintiff has identified CDCR as a defendant in this action. However, CDCR is not a
 15 proper defendant because state agencies are immune from suit under the Eleventh Amendment.
 16 See Will v. Michigan Dep’t of State Police, 491 U.S. 58, 66 (1989); Lucas v. Dep’t of Corr., 66
 17 F.3d 245, 248 (9th Cir. 1995) (per curiam) (holding that prisoner’s Eighth Amendment claims
 18 against CDCR for damages and injunctive relief were barred by Eleventh Amendment immunity);
 19 Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 100 (1984) (Eleventh Amendment
 20 immunity extends to state agencies); see also Hafer v. Melo, 502 U.S. 21, 30 (1991) (clarifying
 21 that Eleventh Amendment does not bar suits against state officials sued in their individual
 22 capacities, nor does it bar suits for prospective injunctive relief against state officials sued in their
 23 official capacities).

24 Plaintiff cannot state a claim against CDCR because CDCR is immune from suit. In any
 25 amended complaint, plaintiff should refrain from identifying CDCR as a defendant.

26 **C. Supervisory Defendants**

27 Plaintiff has named the warden of CSP-SAC and the director of CDCR as defendants in
 28 this action. However, liability may not be imposed on supervisory personnel for the actions or

omissions of their subordinates under the theory of respondeat superior. Ashcroft v. Iqbal, 556 U.S. 662, 676-77 (2009); Simmons v. Navajo County, Ariz., 609 F.3d 1011, 1020-21 (9th Cir. 2010); Ewing v. City of Stockton, 588 F.3d 1218, 1235 (9th Cir. 2009); Jones v. Williams, 297 F.3d 930, 934 (9th Cir. 2002). Supervisors may be held liable only if they “participated in or directed the violations, or knew of the violations and failed to act to prevent them.” Taylor v. List, 880 F.2d 1040, 1045 (9th Cir. 1989); accord Starr v. Baca, 652 F.3d 1202, 1205-06 (9th Cir. 2011); Corales v. Bennett, 567 F.3d 554, 570 (9th Cir. 2009); Preschooler II v. Clark County School Board of Trustees, 479 F.3d 1175, 1182 (9th Cir. 2007); Harris v. Roderick, 126 F.3d 1189, 1204 (9th Cir. 1997).

The complaint does not contain any factual allegations indicating that the warden or director had any involvement in or knowledge of the events giving rise to plaintiff’s claim. Because the allegations fail to show that these defendants were involved in the alleged rights violations the complaint fails to state a claim against these defendants.

IV. Amending the Complaint

Should plaintiff choose to file an amended complaint, he must demonstrate how the conditions about which he complains resulted in a deprivation of his constitutional rights. Rizzo, 423 U.S. at 370-71. Also, the complaint must allege in specific terms how each named defendant is involved. Arnold v. Int’l Bus. Machs. Corp., 637 F.2d 1350, 1355 (9th Cir. 1981). There can be no liability under 42 U.S.C. § 1983 unless there is some affirmative link or connection between a defendant’s action and the claimed deprivation. Id.; Johnson v. Duffy, 588 F.2d 740, 743 (9th Cir. 1978). Furthermore, “[v]ague and conclusory allegations of official participation in civil rights violations are not sufficient.” Ivey, 673 F.2d at 268.

Plaintiff is advised that in an amended complaint he must clearly identify each defendant and the action that defendant took that violated his constitutional rights. The court is not required to review exhibits to determine what plaintiff’s charging allegations are as to each named defendant. If plaintiff wishes to add a claim, he must include it in the body of the complaint. The charging allegations must be set forth in the amended complaint, so defendants have fair notice of the claims plaintiff is presenting. That said, plaintiff need not provide every detailed fact in

1 support of his claims. Rather, plaintiff should provide a short, plain statement of each claim. See
2 Fed. R. Civ. P. 8(a).

3 In an amended complaint, the allegations must be set forth in numbered paragraphs. Fed.
4 R. Civ. P 10(b). The amended complaint must show the federal court has jurisdiction, the action
5 is brought in the right place, and plaintiff is entitled to relief if plaintiff's allegations are true. It
6 must contain a request for particular relief. Plaintiff must identify as a defendant only persons
7 who personally participated in a substantial way in depriving plaintiff of a federal constitutional
8 right. Johnson, 588 F.2d at 743 (a person subjects another to the deprivation of a constitutional
9 right if he does an act, participates in another's act or omits to perform an act he is legally
10 required to do that causes the alleged deprivation).

11 The federal rules contemplate brevity. See Galbraith v. County of Santa Clara, 307 F.3d
12 1119, 1125 (9th Cir. 2002) (noting that "nearly all of the circuits have now disapproved any
13 heightened pleading standard in cases other than those governed by Rule 9(b)"); Fed. R. Civ. P.
14 84; cf. Rule 9(b) (setting forth rare exceptions to simplified pleading). Plaintiff's claims must be
15 set forth in short and plain terms, simply, concisely, and directly. See Swierkiewicz v. Sorema
16 N.A., 534 U.S. 506, 514 (2002) ("Rule 8(a) is the starting point of a simplified pleading system,
17 which was adopted to focus litigation on the merits of a claim."); Fed. R. Civ. P. 8.

18 Plaintiff is informed that the court cannot refer to a prior pleading in order to make his
19 amended complaint complete. An amended complaint must be complete in itself without
20 reference to any prior pleading. E.D. Cal. R. 220. Once plaintiff files an amended complaint, all
21 prior pleadings are superseded. Therefore, in an amended complaint, as in an original complaint,
22 each claim and the involvement of each defendant must be sufficiently alleged.

23 By signing an amended complaint, plaintiff certifies he has made reasonable inquiry and
24 has evidentiary support for his allegations, and for violation of this rule the court may impose
25 sanctions sufficient to deter repetition by plaintiff or others. Fed. R. Civ. P. 11.

26 MOTION TO APPOINT COUNSEL

27 Plaintiff has submitted, along with the complaint (ECF No. 1 at 1) and in a separate filing,
28 a motion to appoint counsel (ECF No. 5). In support of his motion he argues the court should

1 appoint counsel because it is difficult for him to get copies and he alleges he cannot get evidence
2 of the weapon used, but “they” would release the evidence to an attorney. (ECF No. 5 at 1.)

3 The United States Supreme Court has ruled that district courts lack authority to require
4 counsel to represent indigent prisoners in § 1983 cases. Mallard v. United States Dist. Court, 490
5 U.S. 296, 298 (1989). In certain exceptional circumstances, the district court may request the
6 voluntary assistance of counsel pursuant to 28 U.S.C. § 1915(e)(1). Terrell v. Brewer, 935 F.2d
7 1015, 1017 (9th Cir. 1991); Wood v. Housewright, 900 F.2d 1332, 1335-36 (9th Cir. 1990).

8 The test for exceptional circumstances requires the court to evaluate the plaintiff’s
9 likelihood of success on the merits and the ability of the plaintiff to articulate his claims pro se in
10 light of the complexity of the legal issues involved. See Wilborn v. Escalderon, 789 F.2d 1328,
11 1331 (9th Cir. 1986); Weygandt v. Look, 718 F.2d 952, 954 (9th Cir. 1983). Circumstances
12 common to most prisoners, such as lack of legal education and limited law library access, do not
13 establish exceptional circumstances that would warrant a request for voluntary assistance of
14 counsel. In the present case, the court does not find the required exceptional circumstances.
15 Plaintiff has not yet stated a cognizable claim; therefore, the court cannot make a determination
16 regarding plaintiff’s likelihood of success on the merits. Accordingly, the motion to appoint
17 counsel will be denied at this time.

18 CONCLUSION

- 19 1. Plaintiff’s motion for leave to proceed in forma pauperis (ECF No. 2) is granted.
- 20 2. Plaintiff is obligated to pay the statutory filing fee of \$350.00 for this action. Plaintiff is
21 assessed an initial partial filing fee in accordance with the provisions of 28 U.S.C. §
22 1915(b)(1). All fees shall be collected and paid in accordance with this court’s order to
23 the Director of the California Department of Corrections and Rehabilitation filed
24 concurrently herewith.
- 25 3. Plaintiff’s motion to appoint counsel (ECF No. 5) is denied without prejudice.
- 26 4. The complaint (ECF No. 1) is dismissed with leave to amend.
- 27 5. Within sixty (60) days of the date of this order plaintiff shall file an amended complaint
28 that complies with the with the requirements of the Civil Rights Act, the Federal Rules of

Civil Procedure, and the Local Rules of Practice. The amended complaint must bear the docket number assigned to this case and must be labeled "First Amended Complaint."

6. The Clerk of the Court is directed to send plaintiff a copy of the civil rights complaint form.

7. Plaintiff is warned that his failure to comply with this order will result in a recommendation that this action be dismissed.

Dated: September 8, 2020


DEBORAH BARNES
UNITED STATES MAGISTRATE JUDGE

DB:12
DB:1/Orders/Prisoner/Civil.Rights/hern0739.scm